

A PROPOSAL TO FEDERALLY LEGALIZE RECREATIONAL CANNABIS

by
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ABSTRACT

This policy proposal examines the issue of the disparity between Federal and State positions regarding cannabis legalization with regards to State cross-border criminal activity and the preeminence of Federal law. The proposal is based on examination of the history of Federal cannabis prohibition policies, State legalization policies, cannabis' part in drug law enforcement, and the growing legal cannabis industry. No Federal court has yet to tackle the disparity between Federal prohibition of cannabis and the 33 States that have legalized cannabis to some degree (either medicinally or recreationally). This demonstrates a reluctance to truly continue Federal prohibition out of nothing more than decades of flawed drug enforcement policies. Therefore, it was recommended that, in light of the U.S. House of Representatives passing the MORE Act of 2019, the Federal government should legalize cannabis products recreationally in order to more effectively establish a legal cannabis industry with regulations similar to the alcohol and tobacco industries currently.

Capstone Advisor: Dr. Paul Weinstein

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DATE: 29 APRIL 2021

TO: MR. RONALD WYDEN, Chairman, U.S. Senate Committee on Finance

FROM: ANDREW BALDWIN

SUBJECT: A Proposal to Federally Legalize Recreational Cannabis

1. Action Forcing Event

The elections in November saw five more states update their legal status of cannabis in varying degrees; Arizona, New Jersey, South Dakota, and Montana legalized recreational cannabis while Mississippi legalized cannabis for medical purposes¹. On 04 December 2021, the United States House of Representatives voted in favor of the MORE Act². Should it successfully pass the Senate, the MORE Act will decriminalize cannabis on the federal level³, but it still leaves power to the states to independently determine the degree of legalization (i.e. medicinal or recreational use).

2. Statement of the Problem

As a result of the divergence of federal law and the laws of some states regarding the decriminalization of cannabis, there is an unresolved tension between federal and state policies of cannabis legalization regarding preeminence. The disparity is unresolved because “...federal courts...have not engaged in any substantial analysis of whether federal law preempts state marijuana laws⁴.” An impasse to the discussion of preeminence is the Constitutional authority of

¹ Smith, Kelly A. 2020. "These States Passed Provisions to Legalize Marijuana in the 2020 Election." forbes.com., last modified 04 Nov, accessed 30 Jan, 2021, <https://www.forbes.com/sites/advisor/2020/11/04/these-states-passed-provisions-to-legalize-marijuana-in-the-2020-election/?sh=6a4bab9662e3>.

² "Actions Overview H.R.3884 — 116th Congress (2019-2020)." congress.gov., accessed 30 Jan, 2021, <https://www.congress.gov/bill/116th-congress/house-bill/3884/actions>.

³ 116th Congress. 2020. H.R.3884 - MORE Act of 2020. 3. 2nd sess. (04 Dec).

⁴ Garvey, Todd and Brian T. Yeh. 2013. State Legalization of Recreational Marijuana: Selected Legal Issues. Washington, D.C.: Congressional Research Service. 9.

the federal government over the states. The federal government is able to utilize fiscal incentives to coax states into adopting certain criminal laws, but the Tenth Amendment “...prevents the federal government from directing states to enact specific legislations, or requiring state officials to enforce federal law. As such, the fact that the federal government has criminalized conduct does not mean that the state, in turn, must also criminalize or prosecute that same conduct⁵.”

The MORE Act of 2020 only calls for the federal decriminalization of cannabis. As with any law, semantics are important – in the case of cannabis, “Decriminalization reduce[s] or eliminate[s] penalties for sale, purchase, or possession of marijuana, although marijuana remains illegal. When marijuana has been recreationally legalized, there is no penalty or criminal record for private possession or consumption of a small amount of marijuana by those aged 21 and older⁶.” The states are legalizing a substance the federal government has declared illegal – thereby subverting federal authority and providing a strong impetus for a review of federal marijuana policy as it relates to state laws.

This legal tension of preeminence manifests itself in, among many other issues, increased rates of cannabis related interstate crime due to mismatched state levels of cannabis legality. By leaving the states to determine the level of legality of marijuana, it is highly likely unnecessary criminal activity will occur on the borders of recreational states, medical states, and illegal states. Meaning that there will be possession arrests for citizens of a recreational state that cross into a medical or illegal state; cannabis tourism will still prove problematic as out-of-state tourists will cross state lines to a recreational state. This is already an issue predominately

⁵ Garvey and Yeh. 2013. 10.

⁶ Maier, Shana L., Suzanne Mannes, and Emily L. Koppenhofer. 2017. "The Implications of Marijuana Decriminalization and Legalization on Crime in the United States." *Contemporary Drug Problems* 44 (2): 127. doi:10.1177/0091450917708790. <https://journals.sagepub.com/doi/full/10.1177/0091450917708790>.

in the regions around Washington state and Colorado. Recreational marijuana legalization around those two states has resulted in a pronounced spike in marijuana possession arrests in bordering counties – which are in states that have not recreationally legalized marijuana⁷.

A study conducted in Nebraska when Colorado legalized medical marijuana showed that “...border counties...experienced a significant and positive change in the rate of possession arrests, sale arrests, and jail admissions. In other words, border counties...experience[d] a significant increase in the rate of marijuana-related criminal justice activity⁸[.]” A report in 2014 showed a 400 percent increase in marijuana seizures along I-80 in Nebraska that originated in Colorado and this increase places extra pressure on the small, rural county police budgets and personnel⁹.

When Washington legalized marijuana, border counties in Idaho and Oregon saw similar issues. In a study that compared counties that border Washington to non-border counties before and after Washington shifted from medical to recreational legalization, “...marijuana possession arrests are higher in border counties even before RML [recreational marijuana sales] (28.3 arrests per 10,000 people in border counties compared with 18.1 arrests in non-border counties). After the implementation of RML, we see a big rise in marijuana possession arrests in border counties but a drop in non-border counties (12).¹⁰ The same study showed, “After RML [recreational marijuana legalization] in Washington, average marijuana possession arrests went from 68.3 [per 10,000 people] to 93.2 in border counties¹¹.”

⁷ Hao, Zhuang and Benjamin W. Cowan. 2017. The Cross-Border Spillover Effects of Recreational Marijuana Legalization: National Bureau of Economic Research..

⁸ Ellison, Jared M. and Ryan E. Spohn. 2017. "Borders Up in Smoke: Marijuana Enforcement in Nebraska After Colorado's Legalization of Medicinal Marijuana." Criminal Justice Policy Review 28 (9): 860. doi:10.1177/0887403415615649.

⁹ Ellison and Spohn. 849.

¹⁰ Hao and Cowan. 2020. 12.

¹¹ Hao and Cowan. 2020. 13.

3. Background/History

The United States has spent over a century regulating drugs and other commercial products. “In 1906 Congress passed the Pure Food and Drug Act...[the Act] did not outlaw marijuana, nor even tax it. Essentially it allowed the Agriculture Department to put standards in place to ensure its safe use. In fact, as long as the [United States Pharmacopeia and the National Formulary (USP-NF)] included marijuana, the substance was legal and regulated under the act.” The Pure Food and Drug Act did not outlaw marijuana, nor even tax it. Essentially it allowed the Agriculture Department to put standards in place to ensure its safe use. In fact, as long as the USP—NF included marijuana, the substance was legal and regulated under the act¹².”

Later, regulations would become more strict – the Eighteenth Amendment of the Constitution and Prohibition, for example. Yet, this style of banning a substance outright was not proven successful and resulted in the Twenty-First Amendment, which repealed the Eighteenth Amendment. New York’s Mayor, Fiorello La Guardia, “...summarized the widespread change of heart toward prohibition in 1933. La Guardia said he supported the repeal of the Eighteenth Amendment “not because I believe that liquor is good but because I know that prohibition is bad.”¹³”

A major catalyst in villainizing cannabis would come from Harry Anslinger, a former member of the Bureau of Prohibition; he was appointed the first commissioner of the Federal Bureau of Narcotics (FBN), a Department of the Treasury agency, in 1930 under President Hoover – a position he served in for over thirty years¹⁴. Linked closely to the enforcement of Prohibition, narcotics enforcement was given to the FBN in 1930; cannabis became a target

¹² Hudak, John. 2016. *Marijuana*. The Short Histories. La Vergne: Brookings Institution Press. 30.

¹³ History. "Whereas: Stories from the People’s House Legislating the Liquor Law—Prohibition and the House." [history.house.gov.](https://history.house.gov/), last modified 13 August, accessed 02 March, 2021, <https://history.house.gov/Blog/2019/August/8-13-Volstead/>.

¹⁴ Hudak. 2016. 33.

during Prohibition by both law enforcement and Congress and that targeting intensified after the repealing of Prohibition in 1933¹⁵.

A commentary on Anslinger demonstrates he treated cannabis in much the same way as alcohol:

Anslinger engaged many of the same types of groups— women, police, local civic organizations— that composed the temperance movement, despite America’s failed experience with alcohol prohibition. In many ways the two movements functioned similarly. Like alcohol, marijuana was painted as a scourge on society, ruining the moral fabric of America, breaking up families, and decreasing Americans’ capacity for gainful employment. Anslinger used or manipulated data to come up with creative statistics and compelling anecdotes. His publicly cited “statistics” likely were “generalized from arrest rates or, perhaps, simply guessed.” If his use of statistics was creative, his marijuana narrative was over the top. In one 1937 essay Anslinger wrote, “No one knows, when he places a marijuana cigarette to his lips, whether he will become a philosopher, a joyous reveler in a musical heaven, a mad insensate, a calm philosopher, or a murderer.” The essay is a stream of vignettes in which young people who use marijuana rob, rape, and murder strangers, police officers, and even members of their own families. Racism became commonplace in Anslinger’s discussion of marijuana, including coded language such as “The cigarettes may have been sold by a hot tamale vendor” or “Marijuana found a ready welcome . . . in a closely congested section of New York.” Anslinger could also be more explicit in his insinuations: “Marijuana was introduced into the United States from Mexico, and swept across America with incredible speed.”¹⁶

Anslinger is also attributed with other outrageous claims such as:

- “There are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos, and entertainers. Their Satanic music, jazz, and swing, result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers, and any others.”
- “Reefer makes darkies think they’re as good as white men¹⁷.”

From these statements, it appears as if the targeting of cannabis was more related to the Anslinger’s personal worldview and fearmongering rather than as a result of the inherent danger of cannabis to physical health.

¹⁵ Sacco, Lisa N. 2014. Drug Enforcement in the United States: History, Policy, and Trends: Library of Congress. Congressional Research Service. 3.

¹⁶ Hudak. 2016. 34

¹⁷ McDonald, David. "The Racist Roots of Marijuana Prohibition." Foundation for Economic Education., last modified 11 April, accessed 02 March, 2021, <https://fee.org/articles/the-racist-roots-of-marijuana-prohibition/>.

The Marihuana Tax Act of 1937 really pushed cannabis towards illegality by imposing an expensive, strictly controlled, and rarely issued tax stamp for the sale of cannabis; all states then made cannabis possession illegal shortly thereafter¹⁸. The interesting aspect here is that the federal government de-incentivized cannabis and the banning of cannabis came from the states. Despite Anslinger's successful demonization of cannabis, Mayor La Guardia commissioned a report in 1939 on cannabis that was prepared by the New York Academy of Medicine; amongst the conclusions in the report were the following:

7. The practice of smoking marihuana does not lead to addiction in the medical sense of the word. . . .

9. The use of marihuana does not lead to morphine or heroin or cocaine addiction and no effort is made to create a market for these narcotics by stimulating the practice of marihuana smoking.

10. Marihuana is not the determining factor in the commission of major crimes.

. . .

12. Juvenile delinquency is not associated with the practice of smoking marihuana.

13. The publicity concerning the catastrophic effects of marihuana smoking in New York City is unfounded.

Thus, the LaGuardia Report rejected the Criminality Theory; the underlying theory of cannabis prohibition during the 1930s and 1940s. Moreover, the report presciently rejected the Gateway Drug Theory of cannabis prohibition¹⁹. The report, however, did not have any real impact on drug policy.

In a similar vein as Anslinger, President Nixon also utilized cannabis to serve personal aims. Nixon is recorded as a paranoid man who would lash out at any who were different from him and whomever he believed to be a threat to him – to include women, blacks, Jews, and even Democrats²⁰. “[Nixon]...capitalized on white Americans’ fears of a changing society and sought to shift blame for these changes onto school integration, crime, drug use, urban unrest,

¹⁸ Sacco. 2014. 4.

¹⁹ Patton, David V. 2020. "A History of United States Cannabis Law." *Journal of Law and Health* 34 (1): 11. <https://www.ncbi.nlm.nih.gov/pubmed/33449455>.

²⁰ Hudak. 2020. 45.

and the quest for civil rights. In fact, Nixon's White House counsel, John Ehrlichman, has been quoted as explicitly stating that Nixon's drug policies were racially motivated²¹. There is record of a conversation between Nixon and his Chief of Staff, Bob Haldeman, on 26 May 1971 where Nixon made his intentions clear:

"I want a Goddamn strong statement on marijuana. Can I get that out of this sonofabitching . . . Domestic Council[sic]? . . . I mean one on marijuana that just tears the ass out of them..."

"You know it's a funny thing, every one of the bastards that are out for legalizing marijuana is Jewish. What the Christ is the matter with the Jews, Bob, what is the matter with them?..."

"By God we are going to hit the marijuana thing, and I want to hit it right square in the puss..."²²

An entry in Haldeman's diary from approximately the same timeframe reads: "[Nixon] emphasized that you have to face the fact that the whole [drug] problem is really the blacks. The key is to devise a system that recognizes this while not appearing to"²³.

In 1970, the Controlled Substances Act (CSA) – that still exists today – laid the framework for modern drug policy. This was passed to consolidate previously separate legislation into one statute²⁴ and it "...classified controlled substances under five schedules according to (1) how dangerous they are considered to be, (2) their potential for abuse and addiction, and (3) whether they have legitimate medical use"²⁵. Cannabis is listed as a Schedule I drug – the strictest and most dangerous of the five schedules – meaning it is federally illegal to possess, produce, or distribute it.

The current tension stems from the states sidestepping this federal statute and independently legalizing cannabis and instating laws governing its production, sale, possession, and use. California started this by medically legalizing cannabis in 1996 when California

²¹ Hudak. 2020. 46.

²² Patton. 2020. 16.

²³ Patton. 2020. 16.

²⁴ Sacco. 2014. 5.

²⁵ Sacco. 2014. 6.

“...voters approved Proposition 215 and its legislature enacted the Compassionate Use Act of 1996²⁶.” Up to the present day, over half of the states have legalized cannabis²⁷. In the 2020 election, four more states enacted new policies – Arizona, New Jersey, and South Dakota legalized recreational cannabis and Mississippi legalized medicinal cannabis²⁸. Tables 1 and 2 (below) show all of the states that have legalized medicinal and recreational cannabis respectively and the years they did so.

Year	States
1996	California
1998	Alaska, Oregon, Washington
1999	Maine
2000	Colorado, Hawaii, Nevada
2004	Montana, Vermont
2006	Rhode Island
2007	New Mexico
2008	Michigan
2010	Arizona, District of Columbia, New Jersey
2011	Delaware
2012	Connecticut, Massachusetts
2013	Illinois, New Hampshire
2014	Maryland, Minnesota, New York
2016	Arkansas, Florida, Louisiana, North Dakota, Ohio, Pennsylvania
2017	West Virginia
2018	Missouri, Oklahoma, Utah
2020	Mississippi, South Dakota

Table 1: U.S. State Medicinal Cannabis Legalization²⁹

²⁶ Rowe, Daniel. 2018. "Harmonizing Federal Tax Law and the State Legalization of Marijuana." *Loyola of Los Angeles Law Review* 51 (1): 311.

²⁷ Boesen, Ulrik. 2020. *A Road Map to Recreational Marijuana Taxation*. Washington, DC: Tax Foundation.

²⁸ Smith, Kelly A. "These States Passed Provisions to Legalize Marijuana in the 2020 Election ." *forbes.com.*, last modified 04 Nov, accessed 30 Jan, 2021, <https://www.forbes.com/sites/advisor/2020/11/04/these-states-passed-provisions-to-legalize-marijuana-in-the-2020-election/?sh=6a4bab9662e3>.

²⁹ Patton. 2020. 19-20.

Year	States
2012	Colorado, Washington
2014	Alaska, District of Columbia, Oregon
2016	California, Maine, Massachusetts, Nevada
2018	Michigan, Vermont
2019	Illinois
2020	Arizona, Montana, New Jersey, South Dakota

Table 2: U.S. State Recreational Cannabis Legalization³⁰

Although the majority of states have legalized cannabis in some capacity, it does not mean that State laws have gone unchallenged.

The Attorney Generals of Nebraska and Oklahoma, for example, have brought a joint lawsuit in federal court against Colorado (States of Nebraska and Oklahoma v. State of Colorado, 2014) alleging that under the U.S. Constitution's Supremacy Clause, Colorado's legalization of marijuana is unconstitutional because it remains illegal under federal law. Colorado's Attorney General has since filed a counterclaim, joined by the Attorney Generals of Washington and Oregon, contending that although marijuana is illegal under federal law, the DEA and the U.S. Attorney's office have decided to take a hands-off approach to the retail regulation of marijuana; thus, any lawsuit should be directed at the federal government for their lack of enforcement rather than at the states whose citizens have voted to legalize the drug. As of this writing, however, the Supreme Court of the United States had yet to decide whether it will agree to hear the case³¹.

Since the CSA provides the federal definition of dangerous illicit substances, it also reflects the targets of law enforcement. Unfortunately, like with Prohibition, the illegality of these substances has resulted in the development of black markets for them. "Marijuana is unique in the Schedule I controlled substance list. Its criminalization has promoted the cartelization of the illicit drug industry and caused the underground market for marijuana to flourish³²." A main reason for the success of the illicit movement and sale of cannabis is the sheer demand for the product – cannabis is more prevalent than other Schedule I drugs like

³⁰ Patton. 2020. 20.

³¹ Ellison and Spohn. 2017. 861.

³² Reid, Melanie. 2020. "Goodbye Marijuana Schedule I - Welcome to a Post-Legalization World." *Ohio State Journal of Criminal Law* 18 (1): 198.

cocaine and heroin and it has led to various criminal organizations (including cartels) generating a significant sum of money³³.

Therefore, “[federal] law enforcement has generally tailored its efforts to target criminal networks rather than individual criminals; its stance regarding drug (particularly marijuana) offenders appears consistent with this position³⁴.” That focus, however, has not meant a reduced number of arrests. On the contrary, “[there] are still more arrests for marijuana possession every year than for all the violent crimes combined³⁵.” The American Civil Liberties Union reported in 2013 that the costs of enforcing cannabis laws ran upwards of \$3.6 billion annually³⁶. Federal agencies reported in FY2013 that marijuana seizures accounted for 95% of the total drug seizures for that year³⁷; U.S. Attorneys also reported that drug cases are also the second largest category of criminal cases they file³⁸.

On the legal side of cannabis, the passage of medical and/or recreational cannabis laws is relatively new – especially recreational use. Colorado was the first state to legalize recreational cannabis sales in 2014³⁹. These laws have proven both a boon to the state that passed it and a bane to border-states that do not share similar laws. The boon comes in revenue generation. “Colorado and Washington’s tax revenue from legalizing recreational marijuana has come to US\$200 million in less than 2 years. Washington collected taxes of about US\$90 million from marijuana sales in less than a year and a half. In fiscal year 2014-2015, Colorado raised almost US\$70 million from marijuana taxes⁴⁰.” Beyond just the state revenue, the legal cannabis

³³ Reid. 2020. 197-198.

³⁴ Sacco. 2014. 15.

³⁵ Reid. 2020. 196.

³⁶ Krishna, Mrinalini. "The Economic Benefits of Legalizing Weed." Investopedia., last modified 12 Nov, accessed 24 Feb, 2021, <https://www.investopedia.com/articles/insights/110916/economic-benefits-legalizing-weed.asp>.

³⁷ Sacco. 2014. 15.

³⁸ Sacco. 2014. 24.

³⁹ Boesen. 2020.

⁴⁰ Maier, et al. 2017. 39.

industry is blooming. “The...industry is estimated to have grown 74% from 2013 to 2014—from a \$1.5 billion to \$2.7 billion industry—making it the fastest growing industry in the United States⁴¹.” The bane is the issue of cross-border crimes.

Nebraska has been dealing with issues on their border with Colorado since Colorado has legalized cannabis. A report from 2014 for the Rocky Mountain HIDTA [High Intensity Drug Trafficking Area] showed that three Colorado counties – Denver, Boulder, and El Paso counties – were mainly implicated in the origins of marijuana seized along I-80 in Nebraska; those counties all are within a three-to-four hour drive from Nebraska and there is speculation that cannabis is making its way to Nebraska’s illicit market by way of dispensary owners or via patients in Colorado⁴². That same report contains an anecdote from a Nebraska State Patrol (NSP) officer whom “...stopped a vehicle for a traffic violation, and subsequently discovered a one pound vacuum-sealed bag of marijuana. The driver admitted to transporting marijuana to Omaha (Nebraska) for US\$200 per trip and stated that a Boulder, Colorado, medical marijuana dispensary owner provided him with the marijuana and paid him for delivery⁴³.” Moreover, their analysis of crime rates noted:

With regard to whether rates of marijuana-related criminal justice activity increased, we found that border counties, but not I-80 counties, experienced a significant and positive change in the rate of possession arrests, sale arrests, and jail admissions. In other words, border counties were the only counties to experience a significant increase in the rate of marijuana-related criminal justice activity after the hypothesized influx of marijuana activity in Nebraska subsequent to the expansion of medical marijuana in Colorado. In line with claims made by criminal justice officials across the state of Nebraska then, it is at least plausible to suggest that the increasing availability or low risk of use in Colorado has contributed to a surplus of marijuana that has made its way over the border to Nebraska⁴⁴.

⁴¹ Rowe. 2018. 314.

⁴² Ellison and Spohn. 2017. 851-852.

⁴³ Ellison and Spohn. 2017. 852.

⁴⁴ Ellison and Spohn. 2017. 860.

The study also noted that Nebraska experienced an increase in “...the rate of marijuana-related arrests, jail admissions, and associated costs of incarceration...,” while “Local law enforcement presence also increased, as did the proportion of arrests made by NSP⁴⁵.”

Similar issues are prevalent in Washington and Oregon where Oregon counties that share a physical border with Washington reported a thirty-three percent increase in arrests after Washington approved Recreational Marijuana Legalization⁴⁶. This is also corroborated by a study that shows “...a substantial amount of marijuana sold in Washington was trafficked out of the state before Oregon legalized recreational marijuana⁴⁷.”

4. Policy Proposal

The two goals of this policy are to 1) increase federal tax revenue by opening a nationally legal cannabis market and 2) reduce cross-border state drug crimes resulting from the disparity between various states’ levels of legalization by at least 25%. An important distinction regarding the second stated goal is not an overall reduction in crime rates; rather a decrease in the specific instances of cross-border cannabis crimes. The proposed policy is the federal legalization of recreational and medicinal cannabis by the establishment of Federal and State cannabis regulations similar to those utilized for alcohol regulation and – should the MORE Act of 2020 fail to pass the Senate – complete removal from the Controlled Substances Act of 1970.

This policy is designed to help all levels of law enforcement (Federal, State, and Local) by reducing the amount of manpower, man-hours, and budget requirements for drug enforcement and mitigate the volume of criminal cannabis cases presented to U.S. courts. It will also help State governments to raise revenue.

⁴⁵ Ellison and Spohn. 2017. 856.

⁴⁶ Hao and Cowan. 2020. 18.

⁴⁷ Hao and Cowan. 2020. 28.

Policy Authorization Tool

Because the CSA is already national law, Federal Congressional legislation will be necessary to remove cannabis from the CSA and establish State regulation authorities similar to those of alcohol. Because regulations are issued by agencies to enforce existing laws, regulation alone cannot contradict what is already a law banning cannabis and cannabinoid substances. Therefore, legislation must be utilized to overturn the prohibition of cannabis before any regulations for public health are enacted.

Policy Implementation Tool

The main tool for implementation of this policy is legislation.

The proposed legislation will edit the CSA by striking any mention of cannabis (or other permutations of marijuana) from the Schedules of illicit substances. The policy will also establish regulatory authorities for cannabis in a manner similar to those of alcohol. This policy will have two timelines: 1) the removal of cannabis from the CSA should be effective immediately; 2) the establishment of cannabis regulations will take one year.

Federally, Cannabis regulation shall be added to the mission of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) as well as the Alcohol and Tobacco Trade Tax Bureau (TTB)⁴⁸. "The Alcohol and Tobacco Trade Tax Bureau (TTB) administers regulations designed to protect consumers and ensures alcohol and tobacco products are appropriately labeled, advertised, and marketed⁴⁹." They would be able to create regulations for a fledgling legal

⁴⁸ "TTB's Mission - what we Do." ttb.com., last modified April 27, accessed 25 Mar, 2021, <https://www.ttb.gov/consumer/about-us-what-we-do>.

⁴⁹ Reid. 2020. 200.

cannabis industry and establish standards to keep American consumers safe. Based on the precedent of the success in the alcohol industry, the States shall have authority to self-regulate the cannabis industry in a similar manner. As such, there will be the cost of bringing on new staff to the ATF and TTB to manage the cannabis regulations, but it is much less expensive an option than building a new agency. Fortunately, the new tax revenue from cannabis sales can go toward funding the Federal regulatory processes and personnel.

There will also be a savings from decreased incarceration rates. “The *Washington Post* reported that in Colorado, the number of marijuana arrests in 2014 was just 5 percent of what it was in 2011, having dropped from 39,027 to 2,036⁵⁰.” A 95 percent decrease in cannabis arrests is overwhelmingly significant.

National estimations from 2018 show that, “Of the 663,000 marijuana arrests made in 2018, more than 608,000 of those arrests were strictly for marijuana possession...⁵¹” By those estimates, cannabis possession accounts for 91.7 percent of all cannabis arrests. That astounding majority incurs an incredible burden on taxpayers through legal fees and incarceration costs. Research estimates that costs come out to “\$30,000-\$35,000 per year to house an inmate; \$1,000-\$5,000 to make an arrest/judiciary costs⁵².” When those individual costs are applied to the estimated 608,000 arrests, the aggregate cost estimate “...[means] American tax payers spent anywhere from \$600 million to \$3 billion solely on arresting and keeping marijuana users incarcerated⁵³.” If the offense for those 608,000 was legalized – i.e.,

⁵⁰ Hudak, John. 2020. *Marijuana: A Short History*. 2nd ed. Washington, DC: Brookings Institution Press. 205.

⁵¹ Lopez, Sheyla, McDonald, Mackenzie, McFadden, C. J., Tang, Cameron and Salazar, Yolanda. "Marijuana & Incarceration: The Effects Marijuana Prohibition has had on Incarceration." [storymaps.arcgis.com](https://storymaps.arcgis.com/stories/97240f5399af40228aae72fb385791ff)., last modified 07 December, accessed 17 April 2021, <https://storymaps.arcgis.com/stories/97240f5399af40228aae72fb385791ff>.

⁵² Lopez, et al. 2020.

⁵³ Lopez, et al. 2020.

possession of cannabis – then the reduction in cannabis related arrests would decrease at a rate very similar to that already experienced by Colorado.

The banking industry will likely support policies that reduce restrictions on their potential business ventures. The American Banking Association wrote in a letter to Michael Crapo and Sherrod Brown in March 2020 showing support for the SAFE Banking Act of 2019. Among their reasoning they state,

Despite this ever-growing voter preference, current federal law continues to prevent banks from safely banking these businesses without fear of federal sanctions. As a result, this segment of our local economies is forced to operate on an all-cash basis, which creates serious public safety, revenue administration, and legal compliance concerns in the communities we serve.

The impact on our local economies could also prove significant, as revenue paid to unrelated industries that provide products and services to state-authorized cannabis businesses such as law firms, accountants and contractors is technically money derived from illegal activities, and thus could be considered money laundering⁵⁴.

From this statement it is clear that the banking industry is in favor of finding a solution to the disparity between state legality and federal prohibition – although they do not make a statement either for or against the legalization of cannabis.

State Treasurers have also written to Congress regarding cannabis-related banking issues. In a letter from April 2018 signed by thirteen State Treasurers, the following observation was made:

[Financial Crimes Enforcement Network's (FinCEN's)] guidance provides specific directions regarding how financial institutions should manage relationships with cannabis businesses, including the anti-money laundering rules in the Bank Secrecy Act and PATRIOT Act. The guidance remains in place, but does not guarantee the U.S. government will not take action against financial institutions following the guidance in good faith⁵⁵.

⁵⁴ American Bankers Association. 2020. Joint State Bankers Association Letter to the Senate: Support S. 1200, SAFE Banking Act of 2019. <https://www.aba.com/advocacy/policy-analysis/joint-sba-letter-to-senate-support-s-1200>. 1.

⁵⁵ "Letter to Congress from State Treasurers Seeking Cannabis Banking Solution." American Bankers Association., last modified 30 April, accessed 17 April, 2021, <https://www.aba.com/-/media/documents/backgrounders/state-treasurers-ltc-cannabis-banking-solution-043018.pdf?rev=a24c45b122cd4034b7a3ebe0c7febd9e>.

They made it clear that the disparity between State legalization and Federal prohibition of cannabis puts their industry at risk of being targeted by federal law enforcement.

5. Policy Analysis

Effectiveness: Will Policy Achieve the Stated Goal?

Whether legalizing cannabis will achieve the stated goal is a valid concern. Crime rates can be difficult to work with, however it is important to remember that the stated goal is not an overall reduction in crime rates; rather a decrease in the specific instances of cross-border cannabis crimes.

There will be difficulties associated with measuring this goal. One of Nebraska's concerns is trafficking of cannabis into the state from Colorado. This was dealt with by a special committee to develop solutions to the alleged trafficking⁵⁶, yet researches have not been able to prove that legal marijuana from a legal state has made its way to another state⁵⁷. This makes defining cannabis trafficking from legal states much more difficult. It is possible to deduce cross-border cannabis trafficking by other means. "A number of Washington's dispensaries are situated on the border near Portland, Oregon and Vancouver, British Columbia, and implementation of RCS [recreational cannabis sales] in Oregon was followed by a substantial reduction in Washington's legal cannabis sales, indicating that a considerable share of sales are to non-residents⁵⁸." This reduction in sales is a likely indicator of cannabis tourism – where individuals from other states travel into a legal state to purchase and consume cannabis products – pre-legalization of cannabis in Oregon.

⁵⁶ Ellison and Spohn. 2017. 849.

⁵⁷ Ellison and Spohn. 2017. 850-851.

⁵⁸ Lane, Tyler J. and Wayne Hall. 2019. "Traffic Fatalities within US States that have Legalized Recreational Cannabis Sales and their Neighbours." *Addiction* (Abingdon, England) 114 (5): 853. doi:10.1111/add.14536. <https://onlinelibrary.wiley.com/doi/abs/10.1111/add.14536>.

Cannabis tourism is the catalyst for the issue of cross-border cannabis crimes because individuals that live close to the state borders believe the risk of being caught is much lower and are, therefore, more likely to bring cannabis back with them from the legal state. DUIs are also common along legal/illegal state boundaries as a result of cannabis tourism. This comes from tourists consuming cannabis and then driving home in the hopes of avoiding possession charges in their home state⁵⁹. “Nebraska previously demonstrated sensitivity to spillover from Colorado, but only in neighboring counties, while Utah’s largest city, Salt Lake City, is approximately 200 miles (320 km) from the border. Driving distance may have an inverted *U*-shaped curve in terms of risk; shorter distances entail less impaired driving, while longer distances discourage cannabis tourism⁶⁰.”

Ultimately, the policy should reduce overall cross-border cannabis crimes as possession will no longer be a chargeable offense. Subsequently, if individuals are not fearful of possession charges, they should have less perceived incentive to consume cannabis and then travel home – thereby decreasing cannabis-related DUIs.

Recreational Legalization is Least Restrictive

When the discussion of cannabis legalization comes to what kind of legalization, there is precedent for the three levels: recreational, medicinal, and decriminalization. The least restrictive option is recreational legalization, where there is no criminal penalty for sale, purchase, possession, or use of cannabis within the bounds of normal regulatory measures. As mentioned before, decriminalization is the most restrictive because does not technically make cannabis legal; it merely reduces the penalty for use and possession – thereby creating only

⁵⁹ Lane. 2019. 853.

⁶⁰ Lane. 2019. 853.

minimal change to the status quo. The next step up would be medicinal legalization, but that proves problematic as well. With medicinal legalization, cannabis use requires some form of medical authorization from a healthcare provider or a state-entity verifying medical need. Otherwise, it is still illegal to use cannabis products.

Medicinal cannabis also does not solve for the issue of potentially disparate state policies – for States that currently have recreational legalization, federal medicinal legalization would still be seen as a retrograde should they be forced to reduce their legalization status to match the federal policy. Moreover, “Studies generally find that MML [medical marijuana legalization] increases the illegal use of marijuana as well as marijuana-related arrests and hospital treatments among adults... In the context of MML, allowing marijuana possession for some individuals (those who qualify to use it medicinally) appears to lead to an increase in illegal use as well⁶¹.” Meaning that the issue of cross-border crimes and larger-scale cannabis law enforcement will not likely experience much decrease at all due to the .

A significant factor for a lack of crime reduction is the lack of proper oversight in regards to medicinal cannabis. “To date, most “medical” cannabis has been sold with almost no medical oversight, with the role of physicians limited to writing a recommendation letter for patients. Physicians do not prescribe cannabis, nor do they provide it⁶².” The obvious issue present is the lack of oversight permits illicit sales and movement of cannabis, particularly as it relates to cannabis tourism. There are parallels that exist with other goods to support this concept:

Dube, Dube, and García-Ponce (2013) and Knight (2013) examine potential externalities associated with U.S. gun laws, with both finding that weaker gun law restrictions lead to an outflow of firearms. Figlio (1995) studies differential drinking ages between Wisconsin (which had a low drinking age in his data range) and border states and shows that counties on the border had more alcohol-related crashes than other

⁶¹ Hao and Cowan. 2020. 7.

⁶² Shover, Chelsea L. and Keith Humphreys. 2019. "Six Policy Lessons Relevant to Cannabis Legalization." *The American Journal of Drug and Alcohol Abuse* 45 (6): 699. doi:10.1080/00952990.2019.1569669. <http://www.tandfonline.com/doi/abs/10.1080/00952990.2019.1569669>.

counties. Lovenheim and Slemrod (2010) similarly find that an increase in a state's minimum legal drinking age actually leads to an increase in fatal accidents for 18-19 year-olds in that state living within 25 miles of a jurisdiction with a lower drinking age. Lovenheim (2008) provides evidence that consumers travel to purchase cigarettes in lower-price jurisdictions⁶³.

While these comparisons are brief, the concept remains that disparate levels of restriction and/or regulation leads to consumer migration to the least expensive feasible option. In that regard, the choice to federally legalize cannabis at the least restrictive manner will allow for states to regulate as they see fit without contradicting federal law.

Additionally, medicinal cannabis excludes recreational users while the recreational cannabis does not intrinsically exclude medicinal cannabis use. One idea was to combine the current regulations systems for recreational and medicinal cannabis. However, there is no consensus on that idea. "One concern about combining the two systems is that sick people will have to pay taxes on a medical product. But many products that can promote health are not tax-exempt (e.g. exercise equipment, cranberry juice for preventing bladder infections, over the counter medications in most states)⁶⁴." Another example could be the implication that a glass of red wine per could promote heart health. This claim does not then go on to advocate for medicinal red wine. Red wine is still regulated just the same as all other alcohols. Cannabis could easily be treated in a similar respect from a policy perspective.

Advantages to Recreational Legalization

Closes Gap between Inconsistent State and Federal Law

As Federal and State policies currently stand, there is a blatant difference in the approach to cannabis – with the Federal policy as the stricter policy. That creates a gap in law

⁶³ Hao and Cowan. 2020. 8-9

⁶⁴ Shover and Humphreys. 2019. 700.

enforcement. How can the federal government legally allow the States to seemingly circumvent federal law to legalize cannabis? Generally, the States claim their authority through the Tenth Amendment and to date, no court has entertained a challenge. Daniel Rowe condenses this issue rather succinctly:

In fact, the federal government has acknowledged a distinction in the level of federal law enforcement for marijuana businesses operating in compliance with comprehensive state regulations versus those that are not. In a 2013 memorandum to United States Attorneys, then deputy Attorney General James Cole outlined the Department of Justice's priorities regarding marijuana enforcement under the Controlled Substances Act. Cole's memorandum listed eight specific concerns of law enforcement, including: preventing the distribution of marijuana to minors; preventing marijuana revenue from going to criminal enterprises, cartels, and gangs; preventing state-authorized marijuana activity from being used as a cover to traffic other illegal drugs or activity; preventing the use of violence or firearms in the marijuana industry; preventing intoxicated driving, and; preventing marijuana growing on public property. Outside of those priorities, the federal government will tend to defer to state and local agencies to handle marijuana activity through their own laws. In assessing a marijuana business's threat to the eight enumerated federal priorities, the memorandum notes that "both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay" any such threats. Thus a state-regulated marijuana business, regardless of whether it is strictly serving seriously ill medical patients or it is operating as a large-scale, for-profit commercial enterprise, may be given prosecutorial deference by the Department of Justice on the basis of its compliance with a "strong and effective state regulatory system"⁶⁵.

As is pointed out, there already exists a precedent for the federal government to essentially turn a blind eye to State cannabis legalization and regulation and admission that State regulation is sufficient. It is at this point that the question should be raised: is federal prohibition truly necessary if it is not upheld in practice?

By legalizing cannabis recreationally, the federal government can effectively close the policy gap between the federal and State policies while promoting the freedom of the American citizen. Should cannabis be legalized, "... the ambivalence and confusion that federal law enforcement currently faces concerning its obligation to uphold existing federal marijuana laws,

⁶⁵ Rowe. 2018. 312-313.

in light of contradictory state law in those states which have already decriminalized the drug, will end. Law enforcement, both federal and state, can hopefully rechannel its resources into combatting other, more serious drug crimes⁶⁶.” Meaning that in the long run, it is possible for cannabis legalization to save money on law enforcement budgets or at the very least to allow for a significant realignment of law enforcement priorities to more efficiently utilize their budgets to protect and defend the public.

Opens Cannabis Industry for Expansion

Aside from the possibility of savings on law enforcement budgets, there is a strong likelihood that legalizing cannabis nationally will allow for a massive expansion in the cannabis industry. States that have legalized cannabis have seen an increase in their revenue far greater than they anticipated. “A recent study projects a compound annual growth rate of 17% for the legal marijuana industry, with medical marijuana sales going from \$4.7 billion in 2016 to \$13.3 billion in 2020 and recreational sales going from \$2.6 billion to \$11.2 billion over the same period. This study also predicts that the industry growth will create more than 250,000 new jobs by 2020⁶⁷.” That recreational sales increase is just over a 430 percent growth in just four years.

This revenue stream is currently untouchable by the federal government. Should it be legalized and fall in line with alcohol, there will be regulation and associated taxes on the goods that will bring in revenue for the federal government. Even with these taxes tacked on to the consumer price, it is likely to still run much lower than the current price of cannabis since the risk of being caught by law enforcement and the harsh punishments are factored into the black market prices. By legalizing cannabis and opening the product to the market, the States’

⁶⁶ Reid. 2020. 199.

⁶⁷ Rowe. 2018. 314.

incentive is to regulate and tax cannabis licensing, production, distribution, and sales, thereby generating a previously unavailable stream of tax revenue. For example, “Colorado’s Department of Education has used money from marijuana taxes to fund Building Excellent Schools Today grants, which fund capital projects, and tax revenue has been dedicated to construction of public schools and public education campaigns⁶⁸.”

A private industry estimation places the impacts of a legal cannabis industry at the following:

- If full legalization occurred in all 50 states today, there would be in excess of 1.46 million jobs, increasing to 1.63 million jobs by 2025.
- Full legalization would result in more legal businesses participating in the market, more consumers participating in the legal market, and more employees on official payrolls, resulting in \$8.4 billion in payroll taxes. By 2025, payroll deductions would increase to \$9.5 billion.
- Assuming a 15% federal sales tax, total revenues from 2018–2025 would reach \$73.7 billion. This amount would be entirely new revenue to the U.S. Treasury, as there are currently no federal sales or excise taxes.
- The total combined taxes under full federal legalization would reach \$175.8 billion between 2018–2025 based on business tax revenues, the payroll withholdings based on the estimated employment, and the 15% retail sales taxes⁶⁹.

<i>Potential Excise Tax Revenue for States Based on Average Taxes Paid by Marijuana Users in Colorado (35\$/oz)</i>	
State	Annual Excise Tax Revenue Based on Colorado Receipts FY 2019 (Million \$)
Alabama	\$102
Alaska	\$30 (\$19)
Arizona	\$197
Arkansas	\$65
California (a)	\$1,209 (\$308)
Colorado	\$252 (\$252)

⁶⁸ Maier, et al. 2017. 39.

⁶⁹ Business Wire. 2019. "U.S. Federal Cannabis Legalization could be Worth \$128.8 Billion in Taxes and 1.6 Million Jobs." Business Wire., last modified 02 Oct, accessed 07 Apr, 2021, <https://www.businesswire.com/news/home/20191002005609/en/U.S.-Federal-Cannabis-Legalization-Could-Be-Worth-128.8-Billion-in-Taxes-and-1.6-Million-Jobs>.

Connecticut	\$112
Delaware	\$27
District of Columbia	\$31
Florida	\$508
Georgia	\$213
Hawaii	\$31
Idaho	\$35
Illinois	\$312
Indiana	\$171
Iowa	\$56
Kansas	\$45
Kentucky	\$92
Louisiana	\$89
Maine	\$59
Maryland	\$152
Massachusetts (a)	\$246 (\$22)
Michigan	\$326
Minnesota	\$134
Mississippi	\$51
Missouri	\$132
Montana	\$39
Nebraska	\$39
Nevada (a)	\$116 (\$99)
New Hampshire	\$51
New Jersey	\$181
New Mexico	\$68
New York	\$499
North Carolina	\$200
North Dakota	\$14
Ohio	\$247
Oklahoma	\$73
Oregon (a)	\$207 (\$102)
Pennsylvania	\$279
Rhode Island	\$41
South Carolina	\$106
South Dakota	\$15

Tennessee	\$146
Texas	\$415
Utah	\$44
Vermont	\$32
Virginia	\$154
Washington (a)	\$314 (\$390)
West Virginia	\$44
Wisconsin	\$132
Wyoming	\$11
Total	\$8,143.47
Note: Calculation is based on average recreational marijuana excise tax paid per marijuana-using resident in Colorado (\$323 in FY 2019) and number of marijuana-using residents in every state. The \$323 is likely an underestimation of the amount paid per legal user, as the total number of users include 18-21-year-olds who do not have access to the legal market in any state. Numbers may be slightly skewed the other way as an amount of excise revenue paid in Colorado is paid by visitors. Numbers do not include general sales taxes, fees, or other business taxes. Colorado charges a 15% wholesale tax and a 15% retail tax.	
(a) Where available; actual tax collections shown in brackets.	
Source: Colorado Department of Revenue; SAMHSA; U.S. Census Bureau; author's calculations.	

Table 3: Potential Excise Tax Revenue for States⁷⁰

Another aspect is the pharmaceutical industry. Should cannabis be legalized, it will become much easier for pharmaceutical researchers to begin more in depth studies into the medical potential of cannabis and cannabinoids. “Only through rigorous research can effective therapies derived from cannabis be approved and regulated by the Food and Drug Administration (FDA). Properties should be investigated in controlled studies and resulting therapies should proceed through FDA approval process as have one CBD-derived medication and two medications derived from synthetic cannabinoids⁷¹.” Following that kind of research, treatment options can go through actual medical providers rather than solely through cannabis

⁷⁰ Boesen, Ulrik. 2020. *A Road Map to Recreational Marijuana Taxation*. Washington, DC: Tax Foundation.

⁷¹ Shover and Humphreys. 2019. 702.

shops. “As cannabinoid-derived drugs are approved [through the FDA], they can be covered by insurance or become available over the counter, where their potency and components will be regulated⁷².”

Disadvantages of Recreational Legalization

THC Concentration is Inconsistent

One disadvantage to the legalization of recreational cannabis is that THC concentrations are inconsistent and therefore not well defined for the consumer. On top of that, THC levels are now much higher than they were in decades past. “Because cannabis today has dramatically higher THC levels than in prior era, past research may underestimate health effects⁷³.” So it is possible that the claims of the benefits of cannabis may not be entirely accurate relative to the amount of THC in cannabis products today. Researchers need time to study current cannabis products to determine health risks and benefits. To mitigate these inconsistencies, one approach is to cap the amount of THC in cannabis products. “Capping the potency of cannabis products can limit the as yet unknown effects of a more potent cannabis while the science can catch up on the nature of modern products⁷⁴.” Yet this decision is not likely to be a popular one.

⁷² Shover and Humphreys. 2019. 700.

⁷³ Shover and Humphreys. 2019. 701.

⁷⁴ Shover and Humphreys. 2019. 701.

Potential for Substance Abuse

As with many other products like alcohol, tobacco there is always a risk of addiction. This is an inherent risk the consumer takes when using these products. However, this risk is assumed by the consumer when making the conscious decision to purchase alcohol or tobacco. Despite the risk of addiction, these products are not illegal but they are regulated. Cannabis would benefit from similar regulation once it is made legal. Moreover, legalization suggests likely price reductions. While typically seen as a benefit the price reduction should not be bereft of taxation. “There is no reason the public should subsidize recreational drug use by making it tax-free, because lower prices feed over-consumption⁷⁵.” The implication being that lower prices may likely only feed addictions.

Legalization Does Not Guarantee Drop In Overall Crime Rates

There is a significant debate regarding the issue of crime rates surrounding cannabis legalization. Some say crime will increase while others say that crime will decrease. One study distills this argument and references the Economic Compulsive Model of Violence; defined, “Economic compulsive violence occurs when drug users engage in profit-oriented criminal activity to maintain their expensive drug habits⁷⁶.”

This study points out that “...research has found a relationship between marijuana and shoplifting, and shoplifting and burglary. However, research also points to the connection between prohibition and crime⁷⁷.” This distinction is an important one as the relation to crime is affected by two variables: cannabis and prohibition. This is the contention where claims of crime

⁷⁵ Shover and Humphreys. 2019. 699.

⁷⁶ Oser, Carrie B., Jennifer L. Mooney, Michele Staton-Tindall, and Carl G. Leukefeld. 2009. "The Drugs—Violence Nexus among Rural Felony Probationers." *Journal of Interpersonal Violence* 24 (8): 1285-1303. doi:10.1177/0886260508322183. <https://journals.sagepub.com/doi/full/10.1177/0886260508322183>.

⁷⁷ Maier, et al. 2017. 28.

rate fluctuations originate. Claims that crime rates will increase generally refer to the alleged connection between cannabis and crime; on the opposite side, those who claim crime rates will decrease generally refer to the connection between prohibition and crime. The study utilized crime statistics from Colorado and Washington from pre- and post-legalization. The study concluded that, "...while crime did not increase [in Colorado and Washington] as some warned it would due to marijuana legalization, data does not show that legalization caused a decrease in crime. The data analyses reveal a lack of relationships between crime rates and the legal status of recreational and medical marijuana⁷⁸."

Viability: Likely Contentions / Opposition Groups

Legal Cannabis Breeds Crime

There is a strong likelihood that the policy of recreationally legalizing cannabis will be met with opposition claiming that legal cannabis will increase crime rates. This concern is not invalid, but it is likely misguided. This opposition stems from the connection of cannabis with property and violent crimes –generally associated with the black market movement of cannabis.

There have been studies that demonstrated a positive connection between the use of cannabis and violent actions as well as noting a statistical relationship where cannabis users were 1.5 times more likely to commit violent crime than non-drug users but that likelihood was greater for users of other drugs like cocaine and heroin⁷⁹. Moreover, it has been identified that "physiological studies fail to show a "direct link between marijuana use and violent behavior". This is a clear example of the difficulty of determining the effects of marijuana use on violence.

⁷⁸ Maier, et al. 2017. 29, 36.

⁷⁹ Jorgenson, Cody and Alexis J. Harper. 2020. "Examining the Effects of Legalizing Marijuana in Colorado and Washington on Clearance Rates: A Quasi-Experimental Design." 3. Journal of Experimental Criminology. <https://link.springer.com/article/10.1007/s11292-020-09446-7#Sec1>

It is possible that the positive relationship between marijuana and violence is more of a question about what risk factors correlate with both illicit drug use and violence⁸⁰[.]”

The United States Is Obligated by UN Treaty

Another argument in maintaining cannabis prohibition is the obligation the U.S. has to a UN treaty. “The principle governing treaty in international drug control, which has been agreed to by more than 180 nations, is the Single Convention on Narcotic Drugs (Single Convention). This framework later served as the blueprint for the CSA [Controlled Substances Act] and other foreign drug control statutes⁸¹.” It is this treaty, the Single Convention, which forms the basis for the U.S. federal prohibition of cannabis. It is also a primary reason for justifying the primacy of federal law. “It is well established that treaties, like federal statutes, may preempt conflicting state laws. The Supremacy Clause expressly provides that in addition to federal law, “all treaties made...under the authority of the United States, shall be the supreme law of the land.”⁸²”

Because the Single Convention contains a prohibition of cannabis, signatories therefore affirm that stance. However, the treaty does not have any inherent executive powers and requires that the signatories enact domestic legislation to fulfill their commitment to the treaty as stated in Article 4 of the 1961 Convention: “The parties shall take such legislative and administrative measures as may be necessary: (a) To give effect to and carry out the provisions of this Convention within their own territories⁸³.” In the case of the United States, that law is the CSA. This is also part of the overall discussion of changing the Schedules in the CSA. “The DEA,

⁸⁰ Jorgenson and Harper. 2020. 3.

⁸¹ Garvey and Yeh. 2013. 18.

⁸² Garvey and Yeh. 2013. 20.

⁸³ United Nations. 2013. “The International Drug Control Conventions.” unodc.org. United Nations Office on Drugs and Crime. 30.

https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf.

for example, has cited the nation's obligations under the Single Convention as the legal justification for denying rulemaking petitions requesting the Attorney General exercise his authority under the CSA to remove marijuana entirely from control, or to transfer marijuana to Schedule III or lower⁸⁴."

No Tension Between Federal and State Law Exists

Beyond the federal commitment to the Single Convention, there is a case that there is no real conflict between the States' legalization of cannabis and the Federal prohibition of cannabis. A report from the Congressional Research Service stated:

Both federal and state courts have consistently held that a state's decision to exempt certain classes of individuals from the state prohibition on marijuana by permitting the drug's use for medicinal purposes does not create a "positive conflict" with federal law. A mere exemption from state prosecution neither (1) makes it "impossible to comply" with both state and federal law nor (2) "stands as an obstacle" to the execution of Congress's objectives⁸⁵.

It also defined the conditions wherein a state law would be in conflict with federal law: "State laws may be deemed to be in conflict with federal law if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸⁶" In that regard, state laws legalizing cannabis do not actively restrict federal law enforcement from upholding federal laws regarding cannabis. Therefore, the case is made that the status quo is satisfactory and provides no impetus for the federal government to legalize cannabis.

⁸⁴ Garvey and Yeh. 2013. 19.

⁸⁵ Garvey, Todd. 2012. Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay between State and Federal Laws: Library of Congress. Congressional Research Service. 9.

⁸⁶ Garvey. 2012. 10.

Legal Cannabis Businesses Currently Restricted

Another poignant facet of the impact that federal cannabis prohibition has on the American people is the pressure on the business sector. The gap between State legalization and Federal prohibition creates an unfavorable environment for cannabis businesses to operate legally and legitimately. Cannabis businesses like legitimate farms and dispensaries face near-crippling restrictions and regulations due to the Section 280E of the U.S. Tax Code. Section 280E reads:

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted⁸⁷.

Granted, Section 280E was enacted in 1982. At that point in the cannabis prohibition narrative, it is likely there was no real consideration that a legal cannabis industry would surface in the U.S. Considering that cannabis is still federally prohibited, State-legal cannabis businesses are unable to adequately file for business benefits that other private industries are eligible for. In an analysis the relationship between Federal tax law and State legalization of cannabis, Daniel Rowe states

As more states legalize marijuana and cannabis-derived products, both for medical and recreational use, the punitive tax effect of section 280E makes it economically impossible for many marijuana-related businesses to function profitably. By disallowing the deduction of otherwise legitimate business expenditures, the Code places such businesses in a situation where they are potentially paying federal income tax on their gross receipts despite netting much less in actual income. In addition, because most states conform, at least in part, to the Code, the inability to deduct ordinary and necessary business expenses for state tax purposes further increases the overall tax burden on marijuana sellers⁸⁸.

⁸⁷ "26 U.S. Code § 280E.Expenditures in Connection with the Illegal Sale of Drugs." Cornell Law School., accessed 12 April, 2021, <https://www.law.cornell.edu/uscode/text/26/280E>.

⁸⁸ Rowe. 2018. 291-292.

A tax advisor group produced a comparative example of how these tax deductions impact cannabis and non-cannabis businesses:

Revenue	\$2,000,000
Less: Cost of Goods Sold	(\$600,000)
Gross Profit	\$1,400,000
Less: Other Selling, General & Administrative Expenses	(\$1,100,000)
Net Income	\$300,000
Non-Cannabis Business	
Less: Net income taxed at 21%	(\$63,000)
Net income after tax	\$237,000
Effective Tax Rate	21%
Cannabis Business	
Less: Gross profit taxed at 21%	(\$297,000)
Net income after tax	\$6,000
Effective Tax Rate	98%

Table 4: Taxation Example of Cannabis/Non-Cannabis Businesses⁸⁹

On top of crippling taxation, cannabis businesses that are legal in their State are still targets of Federal law enforcement. A memorandum from the Deputy Attorney General in October 2009 made this very clear. It states, "...this guidance [does not] preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law⁹⁰," and the Department of Justice issued a clarification of the Odgen Memorandum stating, "Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA] regardless of state law⁹¹."

This policy is not designed to leave the cannabis industry completed unregulated. It is highly likely that cannabis regulation will follow in a similar fashion to alcohol regulations. "The

⁸⁹ Prest, Adam S. "How Section 280E Creates Big Tax Challenges for the Cannabis Industry." Anders CPA., last modified 02 April, accessed 12 April, 2021, <https://anderscpa.com/how-section-280e-creates-big-tax-challenges-for-the-cannabis-industry/?tag=cannabis>.

⁹⁰ Ogden, David W. "Memorandum for Selected United States Attorneys." justice.gov., last modified 19 October, accessed 12 April, 2021, <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

⁹¹ Garvey. 2012. 3.

21st Amendment to the Constitution was responsible for repealing prohibition in the United States, and it allows individual states to control the sale, distribution, and importation of alcohol within the state⁹².” Following that, there is room for public education to the risks involved with use of cannabis. Though this policy calls for the legalization of cannabis, the fact that risks are associated with its use is not unrecognized. Legalization would allow the American citizen the right to choose whether they accept the risk of using cannabis products just like alcohol.

It is likely that “[advertising] regulations like those in place for tobacco products – for example, advertising cannot target children, limits on where and when advertisements can be displayed or aired – may also be a key tool to promote public health⁹³.” These regulations could easily be released from the U.S. Surgeon General akin to the warnings and regulations already put out on tobacco products today. It would not be unexpected to see the development of “[ad] campaigns similar to the public health campaigns about alcohol – covering topics like getting help when use is out of control, abstaining during pregnancy and while trying to become pregnant, not using while driving, and not selling to minors ...⁹⁴.” These types of regulations and health information will still promote public health and limit the restrictions on legitimate business practices for the legal cannabis industry.

6. Political Analysis

This policy shall be measured in Liberty, its Effectiveness, and its Political Viability. From the standpoint of Liberty, this policy should be judged on the ability of citizens to engage in the business of and consumption of cannabis without fear of criminal charges brought against them. For Effectiveness, this policy should be able to legalize cannabis and remove legal status

⁹² Reid. 2020. 199.

⁹³ Shover and Humphreys. 2019. 700.

⁹⁴ Shover and Humphreys. 2019. 700.

confusion between Federal and State levels as well as State-to-State disparities; alongside that there should also be at least a 25% drop in cross-border cannabis crimes. As this policy relates to

Political Viability:

According to the Congressional Research Service, the percentage of adults that support legalization of marijuana (for any purpose) has increased from 12% in 1969 to 60% in 2016. In terms of medical marijuana, a 2010 research poll found that 73% of people support legalizing “the sale and use of marijuana for medical purposes if it is prescribed by a doctor.” Overall support for the legalization of marijuana has more than doubled since 1995 according to Gallup polls, and a majority of the population believe that the federal government should not enforce federal prohibition laws in states where marijuana has been legalized⁹⁵.

Preeminence of Federal Law (*Should be in Policy Analysis?*)

A primary concern in the issue of States legalizing cannabis is the Constitutional question of the preeminence of Federal law. Under the Supremacy Clause, a federal statute cannot be subverted by State law. Therefore, by all rights, the States are violating the Supremacy Clause and the CSA by legalizing cannabis. However, the discussion surrounding cannabis legalization is much more nuanced. No federal court has taken on this issue, but should it be challenged, “State drug laws, including those connected to marijuana cultivation, distribution, or possession have generally been considered to be within “the historic powers of the States.” Consequently, the Washington and Colorado laws would likely be accorded a presumption of validity⁹⁶.”

⁹⁵ Rowe. 2018. 312.

⁹⁶ Garvey and Yeh. 2013. 10

Congressional Support and Opposition to Legalization

Support for this policy in the Senate will be mixed. Likely allies for this policy will be Senate Majority Leader Schumer and Senator Booker of New Jersey. Both have supported legalization of cannabis and reducing restrictions on the American people in recent history.

There will be most likely be staunch resistance from Senate Minority Leader McConnell. In a press statement on 08 May 2018, Senator McConnell is quoted saying, “Yeah, I do not have any plans to endorse legalization of marijuana⁹⁷.” Although that quote was almost three years ago, his stance toward cannabis has remained unchanged. As the Senate Minority Leader and a senior member of the Senate, Senator McConnell will likely be able to pressure Senate Republicans, via his whips, to vote in opposition to any cannabis legalization.

Population Support of Legalization

Despite historical opposition from Republicans in Congress, including the staunch resistance of Senator Mitch McConnell, Americans are increasingly supportive of cannabis legalization. A Gallup poll before the 2020 Presidential Election shows that, “Since 2012...Americans' support for marijuana legalization has risen 20 points to a record-high 68%⁹⁸.” Based on those poll numbers, there is a high likelihood that the American public will support measures to legalize cannabis. The poll, conversely, does show that 32% oppose legalization, so it will not be accepted unanimously.

⁹⁷ "McConnell: 'I Do Not Have Any Plans to Endorse the Legalization of Marijuana'." Washington Post., last modified 08 May, accessed 12 April, 2021, https://www.washingtonpost.com/video/politics/mcconnell-i-do-not-have-any-plans-to-endorse-the-legalization-of-marijuana/2018/05/08/3208bbb0-52ef-11e8-a6d4-ca1d035642ce_video.html.

⁹⁸ Brenan, Megan. "Support for Legal Marijuana Inches Up to New High of 68%." Gallup.com., last modified 09 Nov, accessed 14 Mar, 2021, <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx>.

An important factor to the discussion of public support is the public view of the justice system and the laws of the land. “[People] are unlikely to voluntarily abide by laws or rules that they view as unwarranted. When the criminal justice system enforces laws that the bulk of the public disagrees with it harms the credibility of the criminal justice system which, in turn, impedes its ability to accomplish its goals of controlling and reducing crime⁹⁹.” The States have already displayed that sentiment by legalizing cannabis despite the CSA and federal prohibition. In that light, the people have advocated at the State level to correct what they deem to be an unjust prohibition of cannabis.

Cannabis and Crime

Cannabis has a long association with crime in the U.S. and that connection has dominated the cannabis narrative. There is a strong likelihood that the policy of recreationally legalizing cannabis will be met with opposition claiming that legal cannabis will increase crime rates. This concern is not invalid, but it is likely misguided. This opposition stems from the connection of cannabis with property and violent crimes –generally associated with the black market movement of cannabis. There have been studies that demonstrated a positive connection between the use of cannabis and violent actions as well as noting a statistical relationship where cannabis users were 1.5 times more likely to commit violent crime than non-drug users but that likelihood was greater for users of other drugs like cocaine and heroin¹⁰⁰.

Alternatively, it has been also been identified that “physiological studies fail to show a “direct link between marijuana use and violent behavior”. This is a clear example of the difficulty

⁹⁹ Jorgenson, Cody and Alexis J. Harper. 2020. "Examining the Effects of Legalizing Marijuana in Colorado and Washington on Clearance Rates: A Quasi-Experimental Design." 2. *Journal of Experimental Criminology*. <https://link.springer.com/article/10.1007/s11292-020-09446-7#Sec1>

¹⁰⁰ Jorgenson and Harper. 2020. 3.

of determining the effects of marijuana use on violence. It is possible that the positive relationship between marijuana and violence is more of a question about what risk factors correlate with both illicit drug use and violence¹⁰¹[.]” That is the question that should be examined more closely: what are the impacts of illicit drug use and distribution on criminal activity. Even from the studies that showed a connection between cannabis use and criminal activity, the control were non-drug users. This means that all illicit drug users are naturally closer to the likelihood of being involved in violent criminal activity purely based on consumption or distribution of illegal substances. Those studies also noted the likelihood of violent criminal activity was much higher for other drugs – implying that cannabis is less dangerous than other illicit drugs like cocaine and heroin.

Unfortunately, there is a drawback to the status quo in states that have legalized cannabis. Researchers “...examined the effect of the density of recreational marijuana dispensaries on crime in Denver, Colorado, and found a positive association between the density of marijuana outlets and the property crime rate in spatially adjacent areas¹⁰².” However, an important qualifier in the analysis of this study states: “...the criminogenic effect of recreational marijuana dispensaries is largely attributable to the fact that marijuana sale is a cash-and-carry business, which exposes both the business and customers to criminal victimization¹⁰³.” Therefore, the increase in violent crime surrounding dispensaries is not related to cannabis itself, but rather the fact that cannabis businesses cannot keep their money in banks due to it still being labeled federally as ‘drug money’. In a comparative analysis of states that had legalized cannabis medicinally, “there was not [a] statistically significant difference in all crime

¹⁰¹ Jorgenson and Harper. 2020. 3.

¹⁰² Wu, Guangzhen, Francis D. Boateng, and Xiaodong Lang. 2020. "The Spillover Effect of Recreational Marijuana Legalization on Crime: Evidence from Neighboring States of Colorado and Washington State." *Journal of Drug Issues* 50 (4): 395.
doi:10.1177/0022042620921359. <https://journals.sagepub.com/doi/full/10.1177/0022042620921359>.

¹⁰³ Wu, et al. 2020. 395.

rates (property, violent, murder, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft), although rates of violent crime, property crime, murder, aggravated assault, burglary, and larceny appear lower in states where medical marijuana has been legalized and put into effect¹⁰⁴.” A conclusion of that study stated, “...thus research supports others’ conclusions that no relationship exists between the presence of dispensaries and violent or property crime rates¹⁰⁵.”

Regarding specific instances of cross-border cannabis crimes, a study “...observed that the property crime rate and larceny rate experienced substantial decreases in the border counties in neighboring states relative to nonborder counties following the legalization in Colorado¹⁰⁶.” Extrapolating the medicinal legalization conclusions to recreational legalization and compared against the results of the dispensary/violent crime research and the examination of cross-border crimes following legalization, a conclusion can be drawn that violent crime involving cannabis will not disappear but should decrease. Additionally, as it relates to the stated goal of the policy, cross-border cannabis crimes should also decrease significantly. This newer crime research effectively challenges the previous narrative that implicates cannabis itself as a causative for crime by demonstrating there are other variables involved that are likely culprits for the connection of cannabis to criminal activity.

“Removing marijuana from the CSA does not mean that marijuana will not be heavily regulated or that marijuana is removed from the list of crimes entirely. Common state criminal offenses like DUI/driving while impaired, open container laws, public intoxication laws, and possession by a minor will more than likely be considered a “status” offense similar to the

¹⁰⁴ Maier, et al. 2017. 38.

¹⁰⁵ Maier, et al. 2017. 38.

¹⁰⁶ Wu, et al. 2020. 406.

consumption of alcohol¹⁰⁷.” This aspect is what drives part of the policy goal to reduce specific cannabis-related crimes. Much like alcohol regulation, cannabis abuse will be prosecuted as actions like DUIs still endanger the safety of others and the substance abuser.

Another aspect of cannabis and crime is the cost of cannabis. By legalizing cannabis, the overall cost should decrease, and the intent is to remove the need for a black market for cannabis. Research identifies the following:

[One] implication of legalization is that the cannabis price in a legal market would drop substantially as a result of increased efficiency of production and the removal of “a black market premium to cover the risks of arrest or drug market violence”. Available data also suggest it is true that the retail price of cannabis decreased sharply in Washington after retail sales were legalized. This means that legal cannabis becomes more affordable in legalized states¹⁰⁸.

Reelection/Political Impacts

The Senate seat for Oregon’s 3rd District is up for election in 2022. Because Oregon is among the States that have recreationally legalized cannabis, it follows that Oregon’s representation to Congress should support the State’s intention to build and support a legal cannabis industry.

7. Recommendation

This policy of cannabis legalization is going to be controversial. Despite that, my recommendation is to pursue the recreational legalization of cannabis. There are plenty of valid concerns from opponents of legalization, yet the advantages and benefits outweigh the concerns.

¹⁰⁷ Reid. 2020. 200.

¹⁰⁸ Wu, et al. 2020. 405.

The majority of States have legalized cannabis in some capacity and polling – as mentioned previously – demonstrates the peoples’ will for legal access to cannabis products. From the Constitutional standpoint, opposition claims that current State cannabis laws are currently not in contradiction with Federal law. However, in accordance with the Supremacy clause, cannabis prohibition should be the law of the land. The fact is that no federal court has challenged the validity of State cannabis legalization. The Department of Justice has paradoxically both turned a blind eye to State cannabis businesses and continued to target them for violations of federal law despite following established state law. Pushing for recreational legalization will remove the question of preeminence while simultaneously acknowledging the sentiments of the people.

On the aspect of crime, reducing the number of cross-border crimes may not reduce the overall amount of crime state border areas, but legalizing cannabis recreationally should reduce the need for law enforcement agencies to spend so much of their valuable resources on pursuing potential cannabis crimes. Much like the Prohibition in the 1930s, the prohibition of cannabis is a powerful impetus for crime and trafficking. A federally legalized and regulated cannabis industry should have a mitigating effect on cartels and others who illegally produce and distribute cannabis currently.

On top of removing the need for illicit production and distribution, legalization and regulation of the cannabis industry will bring in new streams of tax revenue. The States that have legalized cannabis have already seen dramatic tax revenue, so there is strong reason to believe that the public will accept a tax on cannabis products if it means they can acquire them without fear of government retribution.

Following public health regulations by the U.S. Surgeon General, third party regulations for the industry are recommended over allowing the industry to set standards. “For oils and

smokeless cannabis products, the per-package limits would need to be set by regulatory bodies of scientists rather than [the cannabis industry]¹⁰⁹.”

Judging by the background of cannabis’ prohibition, there are strong racial motivations that should be ended. The policies of prohibition stemming from Anslinger were unmistakably motivated by both a racist viewpoint and pro-Prohibition career. Mr. Anslinger’s racially motivated aims carried into the Nixon administration and eventually the CSA. A stand against cannabis on the CSA could signal a desire to move past racially motivated policies.

As far as the United Nations and the Single Convention is concerned, there is precedent to agree to the Convention with an objection that certain products would be legal within their borders. Bolivia has agreed to the Convention with a caveat, “...the Plurinational State of Bolivia will continue to take all necessary measures to control the cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf¹¹⁰.” Granted, Bolivia is referring to a much more dangerous drug – cocaine – and this policy is discussing cannabis, but their caveat is still valid as cannabis is still listed as a prohibited substance in the Convention. Therefore it is possible for the U.S. to reaffirm their commitment to the Convention with the submission of an objection that states cannabis will be legal in the U.S under regulations.

Unfortunately, as this policy relates to Congress, it is highly likely that Senator McConnell will be a key player in disallowing this policy to pass the Senate. Therefore, there is a strong likelihood it will not become law. Despite that, the image to the public is important and

¹⁰⁹ Shover and Humphreys. 2019. 701.

¹¹⁰ United Nations. "Chapter VI: Narcotic Drugs and Psychotropic Substances." United Nations Treaty Collection., last modified 11 January, accessed 16 April, 2021, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-18&chapter=6&clang=_en.

pursuing a policy to legalize a product the public wants legal access to will look good for the writers and supporters.

CURRICULUM VITAE

Andrew Baldwin was born on 15 May 1989 and was raised in Levittown, Pennsylvania where he graduated from Harry S. Truman High School in 2007. He attended his alma mater, Lynchburg College (now University of Lynchburg), and graduated in 2011 with a BA in Theatre and a double minor in International Relations and History. He then enlisted as an Airborne Intelligence Operator in the United States Air Force for six years and left Active Duty with an Honorable Discharge. He graduated from the Johns Hopkins University Kreiger School of Arts and Sciences in 2019 with a MA in Global Security Studies.